

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

DIVISION II

CACR 06-174

October 4, 2006

DAVID ANDREW McELROY

APPELLANT

APPEAL FROM THE PULASKI COUNTY
CIRCUIT COURT
[NO. CR-03-2055]

V.

STATE OF ARKANSAS

HONORABLE WILLARD PROCTOR, JR.
JUDGE

APPELLEE

AFFIRMED

Appellant David McElroy was charged by the State with residential burglary, domestic battering in the third degree—second offense, and violation of a protection order. After a bench trial in the Fifth Division Circuit Court of Pulaski County, he was found guilty of all three offenses and was sentenced as an habitual offender to six years in the Arkansas Department of Correction. He appeals his convictions for residential burglary and domestic battery in the third degree arguing there is not sufficient evidence upon which to sustain the convictions.

We first consider the conviction for residential burglary. Arkansas Code Annotated section 5-39-201 (Repl. 1997) provides that a person commits residential burglary if “he or she enters or remains unlawfully in a residential occupiable structure of another person with

the purpose of committing in the residential occupiable structure any offense punishable by imprisonment.” Appellant contends on appeal that this conviction is not supported by sufficient evidence because appellant did not enter the victim’s home with the purpose of committing a felony. He argues that the victim was unintentionally injured during a struggle over a baseball bat, and therefore, he lacked the requisite intent to commit domestic battering in the third degree. He asserts that because the underlying battery charge should not stand, it cannot support his conviction for residential burglary. Appellant misconstrues the law.

At the trial Ms. Kimberly Grisby testified that she and appellant dated for ten years and that they have a child together. On June 21, 2002, a permanent order of protection was entered finding that domestic abuse existed and ordering that appellant have no contact with Ms. Grisby for two years. The last paragraph of the order provides that violation of the order carries “a maximum penalty of up to one (1) year imprisonment in the county jail or a fine of up to One Thousand Dollars (\$1,000.00) or both and any law enforcement officer with proper jurisdiction shall enforce the terms herein.” Ms. Grisby testified that on December 27, 2002, at 2:00 a.m., appellant knocked on the door of her apartment and told her that he wanted to come in and talk to her. She told him that she did not want to talk to him, and she did not let him enter. Appellant left the apartment, but he returned at approximately 4:00 a.m. and broke in the door. Ms. Grisby testified that she did not want appellant in her apartment, and she did not believe he just wanted to talk to her, so when he kicked in the door, she grabbed a baseball bat and started swinging it. During the scuffle, appellant hit Ms. Grisby in the face and took the bat away from her. She testified that when appellant hit her

in the face it caused pain and it caused her eyes to swell. Ms. Grisby was able to get away from appellant and call the police.

Officer John Roberts of the North Little Rock Police Department testified that he went to Ms. Grisby's apartment at approximately 4:30 a.m. on December 27, 2002. He said that she was very upset and that both of her eyes were swollen. Officer Roberts testified that it appeared to him as if the door frame to the apartment had been kicked in or that bodily force had been used to break into the door.

Appellant testified at the trial, and he did not contest that he went to Ms. Grisby's apartment at 2:00 a.m. and again at 4:00 a.m. He said that he went to the window of the apartment and asked Ms. Grisby to let him in, but she told him she did not want to talk. He testified that the door frame was already broken because "I already kicked the door in about two weeks before then because I didn't have my key." Appellant said that he "mashed the door with my shoulder" and entered the apartment because "it was just on my mind, just to get my woman back." Appellant acknowledged that he was "guilty of violating my protection order," but he denied intentionally hitting Ms. Grisby. Appellant testified that, once he got into the apartment, Ms. Grisby was swinging the bat and screaming and hollering, and he was trying to take the bat away from her. He stated that if Ms. Grisby "got a swollen something it's by me and her just swapping around with the bat and me trying to catch the bat." Appellant said that when he took the bat away from Ms. Grisby she "took out running," and at that point he knew she was going to call the police so he "went on and left." After the State's case and again after his defense, appellant moved for a dismissal arguing

that there was not sufficient evidence to support the residential burglary and domestic battery charges. The trial court convicted appellant, and this appeal ensued.

A motion for directed verdict or to dismiss is a challenge to the sufficiency of the evidence. *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion. *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000). In a challenge to the sufficiency of the evidence, the appellate court reviews the evidence in the light most favorable to the State. *Id.*

Contrary to appellant's assertion, the residential burglary statute does not require that a person unlawfully enter a residence with the purpose of committing a felony, rather it requires that a person unlawfully enter a residence with the purpose of committing any offense punishable by imprisonment. Appellant admitted that he forced his way into Ms. Grisby's apartment and that he knew he was in violation of the protection order when he did so. Because the foregoing constitutes substantial evidence, we affirm appellant's conviction for residential burglary.

Appellant also asserts that the State did not present evidence proving that he acted with the purpose to cause physical injury to Ms. Grisby; therefore, he maintains there was not substantial evidence to support his conviction for domestic battering in the third degree. Pursuant to Ark. Code Ann. § 5-26-305 (Repl. 1997), a person commits domestic battering in the third degree if with the purpose of causing physical injury to a family or household

member, he causes physical injury to a family or household member. Arkansas Code Annotated section 5-2-202(1) (Repl. 1997) provides that a person acts purposely when “it is the person’s conscious object to engage in conduct of that nature or to cause the result.” A criminal defendant’s intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004). Moreover, because of the obvious difficulty in ascertaining a defendant’s intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.* The trier of fact is free to believe all or part of any witness’s testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004).

In the case at bar, Ms. Grisby testified that appellant hit her in the face causing pain and swelling in her eyes. Officer John Roberts also testified that Ms. Grisby’s eyes were swollen. Appellant maintains that he did not hit Ms. Grisby, and that her injuries were caused during their scuffle with the baseball bat. Given the testimony, substantial evidence exists to support appellant’s conviction for domestic battering in the third degree; accordingly, we affirm.

Affirmed.

HART and GLOVER, JJ., agree.